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In the
Supreme Court of the United States
October Term, 1996

MID-SOUTH CONTROLS & SERVICES, INC.,
Petitioner,

versus

EARL J. HEBERT, JR.,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Third Circuit, State of Louisiana

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT, EARL J. HEBERT, JR.

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OPPOSITION TO WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Respondent, Earl J. Hebert, Jr., respectfully asserts that the decision of the Louisiana Third Circuit Court of Appeal in the present case need not be reviewed by this court because this case does not present a significant issue of federal law and does not present a significant conflict between federal law and the laws of the State of Louisiana.

STATEMENT OF THE CASE

This case involves a lawsuit filed in Louisiana State District Court by Earl J. Hebert, Jr. against Mid South Controls & Services, Inc. arising out of Hebert's employment and business relationship with Mid South. Hebert alleged in his suit for damages that he was both an employee and a shareholder of Mid South Controls and that, following a work related injury for which Hebert collected workers' compensation benefits under the Longshore Harbor Workers' Compensation Act (LHWCA), Mid South Controls unlawfully discriminated against Hebert by either firing or refusing to rehire him after his medical treatment. Hebert sued Mid South Controls in Louisiana State District Court for retaliatory work place discrimination under La. R.S. 23:1361(a). Additionally, Hebert's suit alleged that Mid South Controls breached its contracts with Hebert by failing to pay Hebert a proper share of the profits of the corporation, by trying to force Hebert out of the corporation, by failing to purchase and maintain proper disability insurance for Hebert, and by other breaches of contractual duty.

This case has not yet been tried and no evidentiary hearings have been held by the trial court; all statements of fact made by Mid South Controls and Hebert are merely assertions. As correctly observed by the Louisiana Third Circuit Court of Appeal in its decision in this matter, since the facts of this case are still in dispute, the procedural history is of primary importance.

A. Procedural History

Following an injury which occurred during the course and scope of Hebert's employment with Mid South Controls while working on a fixed platform located on the outer continental shelf, Hebert filed a claim for workers' compensation benefits under the LHWCA. Shortly thereafter, and following a period of discriminatory conduct by Mid South Controls in retaliation for Hebert's having filed the workers' compensation claim,

Hebert filed the present suit alleging the Louisiana state tort of retaliatory work place discrimination under La. R.S. 23:1361 and breach of contract claims arising out of Hebert's relationship with Mid South Controls.

On June 11, 1993, approximately two (2) months after Hebert filed the present action in Louisiana state court, Mid South Controls filed Declinatory Exceptions of Lack of Subject Matter Jurisdiction and Improper Venue, Dilatory Exceptions of Vagueness and Prematurity, and a Peremptory Exception of No Cause of Action. A hearing was held on these exceptions on June 26, 1993 before Judge Lucien Bertrand. After taking the matter under advisement, Judge Bertrand issued a written ruling granting the Dilatory Exception of Vagueness and ordering Hebert to amend his petition to clarify whether the injury was sustained on the outer continental shelf. The ruling on the Declinatory Exception of Lack of Subject Matter Jurisdiction was continued pending Hebert's amendment. The remaining Exceptions of Prematurity, Improper Venue and No Cause of Action were overruled. On September 30, 1993, Hebert amended the original petition to clarify that the accident which was the subject of the workers' compensation proceeding occurred on the outer continental shelf. Neither Hebert nor Mid South Controls appealed Judge Bertrand's rulings on any of the exceptions.

Hebert did not assert any Louisiana workers' compensation or tort claims in the Louisiana state courts or the Louisiana Office of Workers' Compensation arising out of the accident. Since Hebert's injury occurred during the course and scope of his employment while working on the outer continental shelf, the LHWCA was the exclusive remedy for claims arising from Hebert's work-related injury. Hebert's claims for medical payments and benefits arising out of his injury were pursued under the LHWCA in the proper forum with the United States Department of Labor. The LHWCA proceeding and the Louisiana state court tort action were litigated concurrently.

Hebert and Mid South Controls subsequently reached a settlement agreement in the LHWCA matter. On December 5, 1994, a joint application for approval of the settlement was filed in the LHWCA

workers' compensation action and on December 19, 1994 the settlement was approved by an administrative law judge of the United States Department of Labor, Office of Workers' Compensation. Under the terms of that agreement, Mid South Controls paid Hebert $75,900.00 in compensation benefits and expenses and secured from Hebert a release for all future claims for workers' compensation benefits arising out of the injury.

On August 9, 1995 Mid South Controls again asserted its Declinatory Exception of Lack of Subject Matter Jurisdiction in the Louisiana state court proceedings. With this exception, Mid South Controls also filed a Peremptory Exception of Res Judicata (under the Louisiana res judicata articles) and reasserted its previously rejected Declinatory Exception of Improper Venue. Mid South Controls' new exception of Louisiana res judicata was based on Mid South Controls' assertion that the settlement of Hebert's workers' compensation claims under the LHWCA precluded Hebert from further pursuing his Louisiana tort suit for retaliatory discrimination and breach of contract. The trial court considered and granted all three (3) exceptions, dismissing Hebert's state law retaliatory discrimination claim and ordering that Hebert refile his contract and other employment related claims in a different venue, Jefferson Parish, Louisiana. Hebert appealed this decision and the Louisiana Third Circuit Court of Appeal reversed the trial court on all three issues. Following the Third Circuit's reversal, Mid South Controls filed an Application for Writ of Certiorari to the Louisiana Supreme Court, which was refused.

Mid South Controls filed an Application for Writ of Certiorari to this court which Hebert hereby opposes.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The conflict between Louisiana Law, La. R.S. 23:1361, and the Longshore Harbor Workers' Compensation Act, 33 U.S.C. § 905 (a), as set forth in the petition for Writ for Certiorari filed by Mid South Controls, simply does not exist. The decision of the Louisiana Third Circuit Court of Appeal in this case does not authorize the receipt of workers' compensation benefits under Louisiana law in addition to workers' compensation benefits under the LHWCA. In fact, Louisiana law, La. R.S. 23:1035.2, prohibits the receipt of Louisiana workers' compensation benefits when the injured employee is eligible to receive workers' compensation benefits under the LHWCA. Additionally, the statute which creates the cause of action asserted by Hebert in the present case, La. R.S. 23:1361, has been interpreted by the Louisiana Supreme Court as constituting a delictual employment law matter, as a statutory exception to employment at will, rather than a workers' compensation matter. Sampson v. Wendy's Management, Inc., 593 So.2d 336, 338 (La. 1992). Accordingly, Hebert's assertion of his Louisiana employment law claim under La. R.S. 23:1361 is not affected by the receipt of workers' compensation benefits under federal law. Since the LHWCA is not intended to preempt the Louisiana regime of at will employment, this case does not present a federal preemption issue suitable for review by this court.

Mid South Controls' assertion in his application to this court that the Louisiana Third Circuit Court of Appeal erred by failing to apply the federal law of Res Judicata in this case is not properly before the court. Mid South Controls first raised the issue of whether the federal law of Res Judicata applies to this case in its petition for Writ of Certiorari to this court. Since this issue was not "pressed or past upon" below, certiorari should not issue to review Mid South Controls' claim that the federal law of Res Judicata should have been applied and, if applied, could have effected the outcome of the case below. Clark v. Jeter, 486

U.S. 456, 100 L.Ed.2d 465, 470-471, 100 S.Ct. 910 (1988); Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 400, 89 S.Ct. 1162 (1969).

I. EARL HEBERT, JR.'S STATE LAW TORT CLAIM FOR RETALIATORY WORK PLACE DISCRIMINATION IS NOT PREEMPTED BY THE LONGSHORE HARBOR WORKERS' COMPENSATION ACT

A. Earl Hebert, Jr.'s State Law Claim For Retaliatory Work Place Discrimination is Not a Workers' Compensation Claim and Does Not Seek Workers' Compensation Benefits

Earl Hebert's claim against Mid South Controls for work place retaliatory discrimination arises under La. R.S. 23:1361, which provides:

> A. No person, firm or corporation shall refuse to employ any applicant for employment because of such applicant having asserted a claim for workers' compensation benefits under the provisions of this chapter or under the law of any state or of the United States. Nothing in this section shall require a person to employ an applicant who does not meet the qualifications of the position sought.
>
> B. No person shall discharge an employee from employment because of said employee having asserted a claim for benefits under the provisions of this chapter or under the law of any state or of the United States. Nothing in this chapter shall prohibit an employer from discharging an employee who because of injury can no longer perform the duties of his employment.
>
> C. Any person who has been denied employment or discharged from employment in violation of the provisions of this section shall be entitled to recover from the employer or prospective employer who has violated the provisions of this

section a civil penalty which shall be the equivalent of the amount the employee would have earned but for the discrimination based upon the starting salary of the position sought or the earnings of the employee at the time of the discharge, as the case may be, but not more than one years earnings, together with reasonable attorney's fees and court costs.

D. The rights and remedies granted by this section shall not limit or in any way affect any rights and remedies that may be available under the provisions of any other state or federal law.

E. Any party found by a Hearing Officer or a court of competent jurisdiction to have brought a frivolous claim under this section shall be responsible for reasonable damages incurred as a result of this claim, including reasonable attorney's fees and court costs.

La. R.S. 23:1361 (emphasis added).

Specifically, Hebert claims that Mid South Controls either fired or refused to rehire him following his release by his treating physicians to return to work and that the discrimination was based solely upon Hebert's having filed a claim for workers' compensation benefits under the LHWCA. Clearly, § 1361 creates a state tort cause of action in favor of Hebert and against Mid South Controls for this kind of retaliatory discrimination.

The Louisiana Supreme Court in Sampson v. Wendy's Management, Inc., 593 So.2d 336 (La. 1992) held that claims under § 1361 are not workers' compensation claims but are, in fact, state law tort claims arising out of the employment contract. The Louisiana Supreme Court held in Sampson that La. R.S. 23:1361 "constitutes a delictual employment law matter, [...] a statutory exception to employment at will, rather than a workers' compensation matter." Sampson v. Wendy's, 593 So.2d at 338. Furthermore, the Louisiana Supreme Court held that the fact that § 1361 is located in the chapter of the Louisiana

Revised Statutes which also contains the state workers' compensation law is irrelevant in determining the nature of the cause of action. A suit under § 1361 simply does not constitute a workers' compensation matter, Sampson v. Wendy's, 593 So.2d at 338-339, and is not preempted by federal workers' compensation laws.

Mid South Controls' argument that La. R.S. 23:1361 is preempted by federal workers' compensation laws fails to consider that, under Louisiana law, a worker is prohibited from receiving Louisiana workers' compensation benefits if that worker is eligible for the receipt of workers' compensation benefits under the Longshore Harbor Workers' Compensation Act. La. R.S. 23:1035.2 establishes this prohibition:

> No compensation shall be payable in respect to the disability or death of any employee covered by the Federal Employers' Liability Act, the Longshoreman's and Harbor Workers' Compensation Act, or any of its extensions, or the Jones Act.

La. R.S. 23:1035.2. Under this statute and the preceding jurisprudence it is clear that Hebert is not receiving both federal and state workers' compensation benefits and no preemption issue exists.

Mid South Controls relies upon LaSassier v. Chevron, 776 F.2d 506 (5th Cir. 1985), for its argument that § 1361 is a workers' compensation matter which may not be filed separately from claims under the LHWCA. In LaSassier, the United States Fifth Circuit criticized the Louisiana Supreme Court's decision in Thompson v. Teledyne Movable Offshore, Inc., 419 So.2d 822 (La. 1982), *appeal dismissed for want of a substantial federal question,* 464 U.S. 802, 104 S.Ct. 48 (1983) which held that workers could choose to receive benefits under either the LHWCA or Louisiana workers' compensation laws because Louisiana state courts had concurrent jurisdiction to adjudicate claims arising on the outer continental shelf. However, the holding of Thompson v. Teledyne which granted Louisiana workers the right to choose whether to pursue state or federal workers' compensation remedies was legislatively overruled by La. R.S. 23:1035.2 (quoted above) which prohibited

workers from seeking state workers' compensation benefits in the event that federal benefits were available.

The conflict between federal and state remedies described in LaSassier v. Chevron has been resolved by the Louisiana Supreme Court. The United States Fifth Circuit Court of Appeal held in LaSassier v. Chevron, *supra*, that claims for retaliatory work place discrimination under La. R.S. 23:1361 are workers' compensation matters which may be preempted if the claimant is an injured worker who has received workers' compensation benefits under the LHWCA. The holding of the Fifth Circuit was based upon the Fifth Circuit's characterization of claims under § 1361 as workers' compensation matters. The Louisiana Supreme Court in Sampson v. Wendy's, *supra*, which was decided seven (7) years after LaSassier v. Chevron, held that claims for retaliatory work place discrimination under La. R.S. 23:1361 were not workers' compensation claims but were claims for wrongful discharge under Louisiana employment law.

When faced with conflicting interpretations of state law, it is well settled that the interpretation of a state statute by the state's highest court is authoritative and binding on this court. R.A.V. v. City of St. Paul, 505 U.S. 377, 120 L.Ed.2d 305, 112 S.Ct. 2538 (1992); Wisconsin v. Todd Mitchell, 508 U.S. 476, 124 L.Ed.2d 436, 113 S.Ct. 2194 (1993). Accordingly, Mid South Control's argument that this court should adopt the interpretation of La. R.S. 23:1361 as set forth in the United States Fifth Circuit Court of Appeal decision in LaSassier v. Chevron and overrule the Louisiana Supreme Court's interpretation of La. R.S. 23:1361 contained in Sampson v. Wendy's Management, Inc., does not present a viable issue for this court's review.

II. MID SOUTH CONTROLS DID NOT ARGUE BELOW THAT THE FEDERAL LAW OF RES JUDICATA APPLIED TO THIS CASE AND MAY NOT RAISE THIS ISSUE IN THE FIRST INSTANCE IN THIS COURT

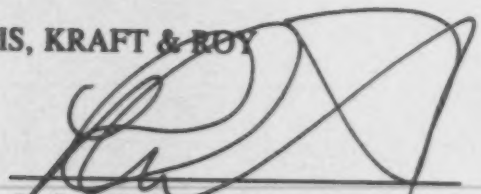
Mid South Controls' assertion in its application to this court that the Louisiana Third Circuit Court of Appeal erred by failing to apply the federal law of Res Judicata in this case is not properly before the court. Mid South Controls first raised the issue of whether the federal law of Res Judicata applies to this case in his petition for Writ of Certiorari to this court. Since this issue was not "pressed or past upon" below, certiorari should not issue to review Mid South Controls' claim that the federal law of Res Judicata should have been applied and, if applied, could have effected the outcome of the case below. Clark v. Jeter, 486 U.S. 456, 100 L.Ed.2d 465, 470-471, 100 S.Ct. 910 (1988); Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 400, 89 S.Ct. 1162 (1969).

CONCLUSION

Earl J. Hebert, Jr. respectfully asserts that the present case presents no significant federal issues for review. The application for Writ of Certiorari filed by Mid South Controls, Inc. should be denied.

Respectfully submitted,

PREIS, KRAFT & ROY

BY: 

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